TAN CHENG YAM

v.

EMPEREE SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
[CIVIL SUIT NO: D5-22-1690-1991]
RK NATHAN JC
24 FEBRUARY 1997

CONTRACT: *Illegality - Defence of - Agreement for purchase of shares in company - Company engaged in illegal enterprise - Whether fundamental root of the contract affected - Whether contract still enforceable - Whether there was failure of consideration - Whether business of company severable from contract - Companies Act 1965 s. 363*

CIVIL PROCEDURE: *Declaration - Alternative remedies provided by law - Claim for repayment of monies paid under allegedly illegal contract - Remedy provided for in statute - Claimant failed to avail himself of remedy - Whether counterclaim should be allowed - Companies Act 1965 s. 363(7)*

CONTRACT: *Liability - Nominee - Whether guarantor a mere nominee - Whether guarantee executed in personal capacity*

The plaintiff owned 5% of the shares in a company known as Magnacasa Holdings Sdn. Bhd. ('MHSB'), an investment company whose subsidiary ('MSB') sold time shares for use of holiday resorts in Malaysia to the public. Prior to the incorporation of MHSB, ownership of MSB was held 51% by Traz Sdn. Bhd. ('TSB', in which the second defendant was a 50% shareholder), 44% by one Ng Kok Seng ('NSK') and 5% by the plaintiff. In August/September 1990, MHSB was incorporated as a holding company to contain the activites of MSB and other future subsidiaries. A share swap took place between MSB and MHSB in which each MSB share was swapped for 10 MHSB shares, resulting in TSB becoming a 51% shareholder in MHSB. The second defendant then appointed the third defendant to the Board of MHSB as his nominee and took charge of the development and planning of MHSB and brought in his own personnel.

In March 1991, the plaintiff entered into an agreement to sell his shares to the first defendant company ('Emperee') for RM480,000. The second defendant, as managing director of Emperee, paid the initial payment of RM100,000 and, together with the third defendant, jointly guaranteed the payment of the balance of RM380,000 which was made by way of several post-dated cheques. The

third cheque was dishonoured but upon being confronted by the plaintiff, the second defendant made partial payment.

In August 1991, the plaintiff, third defendant, MSB and another major shareholder of MHSB ('NKS') were charged in the Sessions Court in relation to the sale of time shares to the public under s. 363(3) of the Companies Act 1965. MSB and NKS were convicted and fined but the charges against the plaintiff and third defendant were withdrawn. On 12 August 1991, the plaintiff received a letter from the first defendant informing him that payment on the last two cheques had been stopped as the legality of MHSB was in question. The plaintiff sued for the balance purchase price of the shares.

The defendants counterclaimed for the return of the monies already paid. The first and second defendants argued, *inter alia,* that the plaintiff had misrepresented the state of MHSB to them, and that as the purpose of the agreement was to acquire the only business of MHSB, ie the unlawful sale of time shares, which was prohibited by s. 363(3) of the Companies Act, there was a failure of consideration. The third defendant pleaded in his defence, *inter alia*, that he was a mere nominee of the second defendant and as the plaintiff was aware of this, he was now estopped from claiming against the third defendant.

The issues for determination are: (i) whether the agreement for the sale of the shares in MHSB was void and unenforceable having as its object an unlawful purpose contrary to ss. 24 and 25 of the Contracts Act 1950; and (ii) if so, whether the first and second defendants were entitled to restitution of the monies paid under the agreement.

Held:

[1] The evidence clearly showed that the first and second defendant knew or ought to have known of the state of the company at the time they entered into the agreement. In the circumstances, the allegations of misrepresentation made by the first and second defendants failed.

[2] Although the time-sharing scheme was a prohibited enterprise, nowhere in the Companies Act is it stipulated that a company which is charged under s. 363 should cease operations. Notwithstanding the fact that the company had done something prohibited by law, the fundamental root of the contract was not affected and was still enforceable. There was therefore no failure of consideration and the mere fact that the first and second defendants formed the opinion that MHSB was no longer viable was not a defence. So long as consideration is adequate, the Court would not enquire into the sufficiency of it.

[3] Although MSB was charged for selling time-sharing memberships illegally, the agreement for the sale of the shares of MHSB was not illegal and there was no suggestion that it was illegal. The contract for selling time-sharing memberships was a separate matter and was severable. The offence commited by MSB did not automatically render the contract illegal.

[4] As for the defendants' counterclaim, s. 363(7) of the Companies Act provides that where any person is convicted under the section, the Court before which he is convicted may order the contract to be void and give consequential directions for the repayment of any money made under the contract. It was apparent that the first and second defendants had failed to avail themselves of this provision since they did not make any representations to the Court and as such, had acquiesced to the rights of the plaintiff. Where a party has a legal means of enforcing his right at the earliest instance but does not do so, the Court will not lend its hand to him when he awakes from his slumber.

[5] None of the third defendant's defences were pleaded, let alone proved in evidence. In any event, the third defendant had signed the guarantee not as a nominee but in his individual personal capacity.

[6] The plaintiff's claim against all three defendants was allowed with interest at 8% per annum from 9 December 1991 to date of realisation and costs. The counterclaim was dismissed with costs.

[Plaintiff's claim allowed. Counterclaim dismissed.]

Cases referred to:

Lim Kar Bee v. Duofortis Properties (M) Sdn. Bhd. [1992] 2 MLJ 281 ***(foll)***
Mustafa bin Osman v. Lee Chua & Anor. [1996] 2 MLJ 141 ***(foll)***
Anderson Limited v. Daniel [1924] 1 KB 138 ***(refd)***
Menaka v. Lum Kum Chum [1977] 1 MLJ 91 ***(refd)***
Boustead Trading (1985) Sdn. Bhd. v. Arab Malaysian Merchant Bank Berhad [1995] 3 MLJ 331 ***(refd)***
St John Shipping Corporation v. Joseph Rank Ltd. [1957] 1 QB 267 ***(foll)***
Shaw v. Groom [1970] 2 CB 504 ***(foll)***

Legislation referred to:

Companies Act 1965, ss. 84, 363(3), (4), (5), (7), (9)
Contracts Act 1950, ss. 24, 25, 86
Companies (Amendment) (No. 2) Act 1992, s. 84

For the plaintiff - Dennis Zavier (Norhaslinda bte Salleh with him); M/s. Xavier, Rafie & Norhaslinda
For the 1st & 2nd defendants - M. David Morais & Azlan Sulaiman (P.S. Khoo with them); M/s. P.S. Khoo & Assoc.
For the 3rd defendant - B.B Teh; M/s. Heng & Mogan

JUDGMENT

RK Nathan JC:

The plaintiff owned 98,000 shares in a company called Magnacasa Holdings Sdn. Bhd. (MHSB) which amounted to 5% of the equity.

Prior to the incorporation of MHSB there was in existence a company known as Magnacasa Sdn Bhd (MSB). The business of MSB was in the sale to the public of time-shares for use of holiday resorts in Malaysia. Under the scheme, the subscribing member would pay a membership fee of RM2,000 and thereafter pay a nominal fee for each time he used the particular resort.

A company called Traz Sdn. Bhd. (TSB) in which the 2nd defendant was a 50% shareholder owned 51% and one Ng Kok Seng (NKS) 44% of MSB. The balance of 5% equity of MSB was held by the plaintiff. In August/ September 1990 MSB underwent a corporate restructure in which MHSB was created as an investment holding company to contain the activities of MSB and such other subsidiaries as may be formed in the future. A share swap took place between MSB and MHSB in which each MSB share was swapped for 10 MHSB shares. Thus TSB became a 51% shareholder of MHSB which in turn held the entire equity of MSB.

After TSB became the majority shareholder of MHSB the 3rd defendant was appointed to the Board as a nominee of the 2nd defendant. The 2nd defendant although not on the Board, nevertheless created an executive committee comprising of two, of which he was one, to oversee the Board of Directors. The 2nd defendant then moved in and acquired an office in MHSB and brought in his own personnel. He also took charge of the development and planning. The 2nd defendant then restructured MHSB. On 6 March 1991 the plaintiff entered into an agreement with the 1st defendant to sell his 5% shares in MHSB for a total purchase price of RM480,000. Upon execution of the said agreement the 2nd defendant paid RM100,000 and it was a term of the agreement that the balance sum of RM380,000 was to be paid to the plaintiff by five monthly instalments of RM76,000 each. The 2nd and 3rd defendants jointly guaranteed the payment of the balance price of RM380,000 under the agreement. Upon receipt of the initial payment of RM100,000, the plaintiff executed blank transfers and delivered the same with the share certificates and with his letter of resignation from the Board of Directors, to the 2nd defendant. Five post-dated cheques were given to the plaintiff and the first two instalments of RM76,000 each were cleared. On 28 May 1991 the cheque for the third instalment was dishonoured with the remarks “payment stopped”. The plaintiff’s case is that when he confronted the 2nd defendant, the latter asked for more time and paid RM10,000 and further smaller amounts amounting

to RM16,000 leaving a total balance of RM212,000. On 12 August 1991 the plaintiff received a letter from the 1st defendant stating that it had stopped payment of the last two cheques. It is this letter that forms the substance of the issue. The letter is therefore reproduced:

ESB/032/91
12 August 1991

Mr. Tan Cheng Yam
D107, Dayang Puteri Court
Taman Putera
68000 Ampang
Selangor **A.R. REGISTERED**

Dear Mr. Tan,

RE: SALES & PURCHASE AGREEMENT

We are writing to inform you that we have stopped payment on the two cheques No. 832512 and 832513 for $76,000 each as our Board has decided that since the legality of Magnacasa Sdn. Bhd. is now in question in the Courts, it will not be possible for us to proceed with the sale until at least this question has been resolved in the Courts.

Since the only business of Magnacasa was the holiday scheme operated by its subsidiary, it was this business which we were interested in acquiring. We hope you will understand our concern and the fact that the whole transaction has changed in nature and the consideration may even have failed completely for the agreement.

Yours faithfully
EMPEREE SDN. BHD.

Sgd.
Authorised Signatory

MHSB was involved in the time-sharing concept. There were numerous other subsidiaries owning valuable properties and it was the case of the plaintiff that the value of MHSB was because of its property base.

The defence of the 1st defendant was that it had entered into the agreement on account of the plaintiff's misrepresentation, *inter alia*, that MHSB, the holding company, owned shares in a subsidiary company MSB which was doing a lucrative business of selling membership to the public for time-sharing holidays in MSB's holiday resorts. The 1st defendant submitted that it was held out by the plaintiff to the 1st defendant that to take over MSB's business and to control MSB, the 1st defendant was required to take over MHSB by purchase of the said shares. It was the case of the 1st defendant that the plaintiff

further had held out that the main asset of MHSB was their shares in MSB and the returns to the 1st defendant and that their investment would be assured from the lucrative business of MSB.

In August 1991, the plaintiff, the 3rd defendant, NKS and MSB were charged in the Sessions Court in Kuala Lumpur in relation to the sale of the time-shares to the public under s. 363(3) of the Companies Act 1965 (the Act) punishable under s. 363(5) of the same Act. On 9 March 1992 MSB and NKS were convicted by the Sessions Court and fined RM12,000 each in default four months imprisonment. The plaintiff and the 3rd defendant were released by the same Court upon the charges being withdrawn against them.

I agree with the 1st and 2nd defendants' submissions that notwithstanding the manner in which the defence has been pleaded, there is principally a single issue to be determined in this matter and that is;

> whether the agreement dated 6 March 1991 is void and unenforceable having as its object or part of its object an unlawful purpose contrary to the provisions of ss. 24 and 25 of the Contracts Act 1950.

If the answer is in the affirmative then the secondary issue is;

> whether the 1st defendant is entitled to restitution or compensation in respect of the monies paid under the agreement, pursuant to s. 66 of the Contracts Act 1950.

Case for the 1st and 2nd Defendants

The defendants contend that illegality need not be specifically pleaded but that once brought to the attention of the Court, the issue of illegality needs investigation. They relied on the judgment of the then Supreme Court in *Lim Kar Bee v. Duofortis Properties (M) Sdn. Bhd.* [1992] 2 MLJ 281, at 288 wherein Peh Swee Chin SCJ said:

> When the contract is not *ex facie* illegal, then on the question of pleadings, there is only one situation where illegality need not be pleaded when the Court can still take judicial notice of illegality and refuse to enforce it. The situation is when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality, e.g. the illegal purpose of the contract, or its illegal consideration, with the presence of all relevant circumstances, see e.g. *Palaniappa Chettiar v. Arunasalam Chettiar* ([1962] MLJ 143), *Leong Poh Chin v. Chin Thin Sin* ([1959] MLJ 246), and *North Western Salt Co. Ltd. v. Electrolytic Alkali Ltd.* ([1914] AC 461) just to mention a few. The existence of such a situation in the instant appeal is warranted by the facts that emerged in evidence, including affidavit evidence.

A similar finding in more liberal terms was made by the Court of Appeal in *Mustafa bin Osman v. Lee Chua & Anor*. [1996] 2 MLJ 141 in the judgment of Gopal Sri Ram JCA at p. 146 wherein his Lordship said:

> We accept as beyond argument that illegality need not be specifically pleaded, and that once the illegality is brought to the attention of the Court before whom the action is being tried, the Court, upon being satisfied that the transaction is indeed illegal, is obliged to act upon it. See, *Natha Singh v. Syed Abdul Rahman & Anor.* [1962] MLJ 265; *Nasib Singh v. Ramasamy* [1969] 1 MLJ 211.

The defendants argued that this Court should not limit itself to a determination based on an *ex facie* legal contract when faced with evidence that the ulterior or collateral purpose of the contract was unlawful. It was pointed out to me that in *Lim Kar Bee* the Supreme Court was faced with an allegation that an agreement for the sale and purchase of land and a trust deed subsequently made thereunder, whilst on its face legal, was really a device to avoid payment of estate duty in regard to the land. The Court held that as the primary purpose of the scheme (which included the sale and the trust deed) was to avoid paying estate duty, the scheme was illegal and thus came within s. 24 of the Contracts Act 1950. As such, the sale agreement and subsequent trust were held unenforceable.

Turning to the facts of this case, these defendants submitted that the purpose of the agreement was for the acquisition of the only business of MHSB, namely the carrying on of an unlawful sale of time-shares. Through DW1 it became apparent that MHSB had no bank accounts of its own and that the income generated exclusively by MSB was from sale of the time-shares to the public. In this respect it was pointed out to me that PW1 and DW1 both confirmed that between RM30,000,000 to RM60,000,000 was collected by MSB from the sale of the shares. It was also in evidence that properties had been purchased with some of these funds but that none of these properties could be shown to have been purchased by any company properly described as a subsidiary of either MHSB or MSB. The whereabouts of these properties are uncertain. What however is clear is that these properties were never injected into MSB or MHSB or any subsidiaries of these companies.

It was further submitted on behalf of the 1st and 2nd defendants that the allegation of the plaintiff that the 2nd defendant took RM500,000 to purchase lands in Langkawi was clearly unsubstantiated since no claims either civil or criminal had been preferred against the 2nd defendant in respect of this sum. DW2 also confirmed that apart from the time-sharing business there was no other business that MSB was involved in. DW2 also affirmed that after the conviction MSB only serviced the members until the monies ran out.

On the next issue, that is, that the business of MSB was unlawful, these defendants relied on *Anderson Limited v. Daniel* [1924] 1 KB 138 wherein Bankes LJ quoting with approval the decision of Wrenbury LJ held as follows at p. 143:

> ... Upon that point I should like to refer to what Lord Wrenbury, then Buckley J, said in one of the moneylender cases: *Victorian Daylesford Syndicate v. Dott* ([1905] 2 Ch. 624, 629): "The next question is whether the Act is so expressed that the contract is prohibited so as to be rendered illegal. There is no question that a contract which is prohibited, whether expressly or by implication, by a statute is illegal and cannot be enforced. **I have to see whether the contract is in this case prohibited expressly or by implication. For this purpose statutes may be grouped under two heads, those in which a penalty is imposed against doing an act for the purposes only of the protection of the revenue, and those in which a penalty is imposed upon an act not merely for revenue purposes, but also for the protection of the public.** That distinction will be found commented on in numerous cases, including those which have been cited of *Cope v. Rowlands* ((1836) 3 M. & W. 149) and *Fergusson v. Norman* ([1838] 5 Bing. N.C. 76). Parke B in the former case says the question to determine is whether the Act is 'meant merely to secure a revenue to the city, and for that purpose to render the person acting as a broker liable to a penalty if he does not pay it? or whether one of its objects be the protection of the public, and the prevention of *improper* persons acting as brokers?' **If I arrive at the conclusion that one of the objects is the protection of the public, then the act is impliedly prohibited by the statute and is illegal." In my opinion that language applies directly to this case. Here the penalty is imposed wholly for the protection of the public, and the purchaser is entitled to take the objection that as the vendors have failed to give the required invoice the contract of sale is illegal and they cannot sue for the price.** (emphasis added)

It was the submission of these defendants that an examination of s. 363(3) of the Act shows both that the act of selling shares to the public is prohibited and that it is clearly enacted for the protection of the public. It was urged upon me that by its very terms s. 363(3) aims at protecting the public against persons offering shares for purchase other than those protected by sub-s. (4).

With regard to the counterclaim the 1st and 2nd defendants submit that unless the parties were *in pari delicto* when they entered into the agreement, the 1st defendant is entitled to succeed on its counterclaim. I was referred to *Menaka v. Lum Kum Chum* [1977] 1 MLJ 91 where the Privy Council held at p. 94:

> ... Neither party was aware of the illegality at the time of making the loan transaction and the documents were prepared and executed on both sides in complete good faith. The contract was "discovered" to be void only after these proceedings had been started. Section 66 of the Contracts Ordinance therefore

applies and both parties before this Board accepted that it does. Section 66 provides as follows:

> When an agreement is discovered to be void, or when a contract becomes void, any person who has received any advantage under such agreement or contract is bound to restore it, or to make compensation for it, to the person from whom he received it.

Mohamed Azmi J gave effect to s. 66 by finding that the advantage which the borrower had received under the contract was the sum of $20,000 and that he should restore that sum to the appellant. But as he had made two payments of interest amounting together to $600 the learned Judge found that $600 was an advantage received by the lender and that it should be deducted from the $20,000 leaving a balance of $19,400 to be paid by the respondent who now represents the borrower. Leaving aside for the moment the question of whether any interest should also be payable, their Lordships agree with both Courts below that the principal sum of $19,400 should be paid by the respondent to the appellant. In that way effect will be given to s. 66 under which each party is bound to restore any advantage which he has received to the person from whom he received it – see *Govindram Seksaria v. Radbone* ([1947] LR 74 Ind. App. 295, 303) where Lord Morton of Henryton said:

> The result of s. 65 of the Indian Contract Act was that, as from the date on which the contract became void each of the parties became bound to restore to the other any advantage which the restoring party had received under the contract of sale.

It was urged upon me to hold that the unlawfulness of the agreement was discovered subsequent to its execution, that is on or around 29 May 1991 and that the agreement was effectively terminated in August 1991. It was also pointed out to me that the charge on which the company was convicted related back to February 1989 which was a time before which the 1st and 2nd defendants had any direct or indirect involvement in MSB or MHSB. In the circumstances I was asked to hold that the 1st defendant was entitled to restitution of the monies paid under the agreement totalling RM268,000.

Case for the 3rd Defendant

The plaintiff's claim against the 3rd defendant is based upon a letter of guarantee dated 6 May 1991 executed by the 3rd defendant. However he said in evidence that he executed the said guarantee under various circumstances. He was at all material times a nominee for the 2nd defendant in the Board of Directors of MHSB and MSB. He was then also the 2nd defendant's nominee shareholder of 1,025,999 shares in TSB which were subsequently transferred to a person or persons not known to the 3rd defendant as he had executed blank transfer forms for those shares and which were restrained by the 2nd defendant. He confirmed that TSB was the vehicle that was used by

the 2nd defendant to buy into MHSB and that he was emplaced on the Board of Directors of MHSB and MSB by the 2nd defendant and that he did not personally have any shareholding in MHSB and MSB and that the plaintiff accepted the 3rd defendant as a guarantor knowing that he was at all material times the nominee for the 2nd defendant.

Whilst described as the Executive Chairman of the 'Magnacasa Group of Companies', the 3rd defendant said that he was in fact acting not very independently by reason of his position as a nominee of the 2nd defendant. It was pointed out to me that the plaintiff had indeed admitted to this during cross-examination by the 3rd defendant. The 3rd defendant submitted that the plaintiff clearly knew that he was a nominee for the 2nd defendant and also that the 2nd defendant had agreed to fully indemnify the 3rd defendant should the plaintiff call upon and claim on the said letter of guarantee. By reason of such collateral knowledge and understanding, it was urged upon me to hold that the plaintiff is now estopped from making this claim against the 3rd defendant. Notwithstanding the fact that he had not pleaded estoppel specifically the 3rd defendant however relied on *Boustead Trading (1985) Sdn. Bhd. v. Arab Malaysian Merchant Bank Berhad* [1995] 3 MLJ 331 wherein the Court of Appeal held that so long as material facts giving rise to a plea of estoppel are raised, there was no need to actually use the term "estopped" in the pleadings.

Further and alternatively the 3rd defendant submitted that from the testimony of the plaintiff and the 2nd defendant it was evident that there were modifications and variations to the original sale and purchase scheme. Since the plaintiff did not lead evidence as to whether the 3rd defendant was aware of or had consented to such changes, which related to the completion date of the transaction coupled with the payment of the balance purchase price, the 3rd defendant relied on s. 86 of the Contracts Act 1950 which provided as follows:

> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

It was thus submitted that the 3rd defendant was discharged of his obligation and liability under the letter of guarantee by operation of law.

Findings of the Court

Was There Misrepresentation by the Plaintiff

The evidence clearly showed that the 1st and 2nd defendants knew or ought to have known of the state of the company at the time they entered into the

agreement. The 2nd defendant was the Deputy in Finance, in an Executive Committee (the EXCO) in MHSB and together with one Amir Senawi, through their company TSB, owned 51% of the equity of MHSB. PW1 in his examination-in-chief testified that the 2nd defendant owned TSB with one Amir Senawi and prior to TSB becoming a shareholder of MHSB the company was known as MSB. After TSB became the shareholder, the Board of Directors of MHSB was changed. PW1 also testified that the 3rd defendant was appointed to the Board of MHSB as a nominee of the 2nd defendant. The 3rd defendant confirmed this in his evidence. PW1 also testified that the 2nd defendant although not on the Board of Directors had created the EXCO and held the position of Deputy in Finance which evidence stands unrebutted and from the Common Agreed Bundle of Documents, his presence in the Board meetings in his capacity as EXCO member is patently clear. I find as a fact that the 2nd defendant knew about the position of the company. I am fortified in making this finding of fact when I consider the evidence of PW2 who testified that upon restructuring the company, the 2nd defendant brought in his own people, namely Joe Sabastian, Lisa Huang and Tengku Ardy. This was not denied by the 2nd defendant. In the circumstances, the allegations of misrepresentation made by the 1st and 2nd defendants must fail.

Time Sharing Scheme and Illegality

The 2nd and 3rd defendants, in raising the issue of illegality in respect of MSB, the subsidiary of MHSB, which was charged under s. 363(3) to be read together with s. 363(9) of the Act for illegally selling time-sharing holidays scheme, contend that there is a failure of consideration in the agreement.

The Arrangement of the Companies Act 1965

For ease of reference the Companies Act is arranged as Part I to Part XII. Each Part, which has its main heading, is then further sub-divided into Divisions bearing sub-headings. Each Division then consists of sections relevant to its own sub-heading. Time-sharing scheme therefore falls under Part IV (Shares, Debentures and Charges). It then comes under Division 5 whose sub-heading is Interests Other Than Shares, Debentures, Etc. and the relevant section is s. 84, which is the interpretation section and which defines time-sharing scheme as:

> ... a scheme, undertaking or enterprise -
>
> (a) participants in which are, or may become, entitled to use, occupy or possess, for two or more periods during the period for which the scheme, undertaking or enterprise, whether in Malaysia or elsewhere is to operate, property to which the scheme, undertaking or enterprise relates; and
>
> (b) that is to operate for a period of not less than three years.

It is also relevant to reproduce s. 363(3) and (9) of the Act:

section 363(3) -

> (3) A person shall not make an offer to the public or to any member of the public (not being a person whose ordinary business it is to buy or sell shares, whether as principal or agent) of any shares for purchase.

section 363(9) -

> (9) In this section -
>
> "shares" means shares of a corporation whether a corporation in existence or to be formed and includes debentures and units and (without affecting the generality of the expression "debentures") all such documents (including those referred to as "bonds") as confer or purport to confer on the holder thereof any claim against a corporation, whether the claim is present or future or certain or contingent or ascertained or sounding only in damages and also includes any interest to which Division 5 of Part IV applies.

Clearly therefore as the law stood then the time-sharing scheme which came under Part IV Division 5 was a prohibited enterprise.

However nowhere in the relevant section, that is s. 363, or anywhere in the Act is there a stipulation that a company which is charged under that section should cease operations. It would be ludicrous to argue that every time a company does something prohibited by the law, it should cease operations. It is my judgment that notwithstanding the fact that the company had done something prohibited by law, the fundamental root of the contract, that is, the transfer of shares in the company, is not affected, as the company did not cease to exist and the contract is still enforceable. As long as the company was not required by law to cease operations, there is no failure of consideration. In my view as long as there is no failure of consideration, the mere fact that the 1st and 2nd defendants formed the opinion that the company was no long viable is not a defence. So long as consideration is adequate, this Court will not enquire into the sufficiency of it. It is not for this Court to denounce a contract, happily entered into by the parties, and to say it is unfair. Any agreement executed or made in the ordinary course of business between two parties must be presumed as intended to be legally binding. If the essential elements of a bargain are present, the Courts will not balance the one side against the other. The parties are presumed to be capable of appreciating their own interests and of reaching their own equilibrium. At this juncture it is imperative that I look at sub-s. (7) of s. 363 of the Act which reads:

(7) Where any person is convicted of having made an offer in contravention of this section, the Court before which he is convicted may order that any contract made as a result of the offer shall be void and may give such consequential directions as it thinks proper for the repayment of any money or the retransfer of any shares; and an appeal against the order and any consequential directions shall lie to the Court.

From the documentary evidence adduced through the Common Agreed Bundle of Documents and from the oral evidence of the witnesses it is apparent that the defendants in this case never availed themselves of this sub-section. Surely the defendants who had clear knowledge of the prosecution ought to have made representations under the sub-section to the Court that found the defendants guilty under s. 363(3) of the Act. Since no representations were made to the Sessions Court, the said Court on its own volition did not make any order under this sub-section.

It is my finding that the 1st and 2nd defendants by their failure to exercise their rights pursuant to this sub-section had by their default, acquiesced to the rights of the plaintiff in this case. When a party has a legal means of enforcing his right at the earliest instance but refused to do so either through ignorance or indolence, this Court will not lend its benign hand to the same defendant for crying foul on a later date when he awakes from his slumber.

It is my finding that although MSB was charged for selling time-sharing memberships without the prospectus, illegally, the defendants herein cannot assume that this should render the present agreement unenforceable. The sales and purchase agreement for the sale of the shares between the plaintiff and the 1st defendant is not illegal and there has been no suggestion that that agreement is illegal. The contract for selling the time-sharing memberships is a separate matter and is severable even if it is illegal. In *St John Shipping Corporation v. Joseph Rank Ltd.* [1957] 1 QB 267, the Merchant Shipping Act 1932 forbade the loading of a ship to such an extent that the loading becomes submerged. A penalty is imposed for breach of the statute. The master of the plaintiff's ship, which had been chartered to an English firm for the carriage of grain from a port in Alabama to England, put into a port in the course of the voyage and took on bunkers, the effect of which was to submerge the loadline contrary to the Act. The master was prosecuted in England for the offence and was fined £1,200. The defendants, to whom the ownership of part of the goods had passed, withheld part of the freight due, contending that the plaintiffs could not enforce a contract which they had performed in an illegal manner. Devlin J rejected this contention and held that the illegal loading was merely an incident in the corpus of performance that did not affect the core of the contract. Again in the case of *Shaw v. Groom* [1970] 2 CB 504, a landlord sued his tenant for arrears of rent amounting to

£103 due in respect of a weekly tenancy. The tenant contended that the action must fail, since the rent book issued to him by the plaintiff did not contain all the information required by the Landlord and Tenant Act 1962. Such a default was punishable by a fine not exceeding £50. The Court of Appeal dismissed this contention. The contract was not to be stigmatised as illegal in its performance. The intention of the legislature was that non-compliance with the statutory requirement should render the landlord liable to a fine, not that it should deny him access to the Courts. Unless this limited construction was placed upon the Act, the result might well be that the landlord would forfeit a sum far in excess of the maximum fine.

I therefore find that the legislature did not, because of s. 363(3) of the Act, intend to preclude the company from proceeding with the operation of the company. The offence committed by the company is, I find, a strict liability offence, and in the circumstances, the contract is, in my view, not automatically rendered illegal as performed merely because some statutory requirement has been violated in the course of its completion.

The submission of the 1st and 2nd defendants that s. 363(3) is enacted for the protection of the public needs a second look.

Section 363(4) of the Act reads as follows:

> (4) Subsection (3) shall not apply -
>
> (a) where the shares to which the offer relates are shares of a class which are quoted on, or in respect of which permission to deal has been granted by, any prescribed Stock Exchange and the offer so states and specifies the Stock Exchange;
>
> (b) where the shares to which the offer relates are shares which a corporation has allotted or agreed to allot with a view to their being offered for sale to the public and the offer is accompanied by a document that complies with all enactments and rules of law as to prospectuses;
>
> (c) to any application for shares in or debentures of a corporation or to any invitation to deposit money with or lend money to a corporation which is issued circulated distributed or made subject to and in accordance with Divison 1 of Part IV;
>
> (d) where the offer relates to -
>
> (i) an interest to which Division 5 of Part IV applies and is accompanied by a statement in writing as required by that Division; or

(ii) deposits or loans to a corporation of the kind referred to in s. 38(6); or

(e) to any advice as to the price at which a management company is prepared to buy or sell any interest to which Division 5 of Part IV applies given or sent by the management company to any person to whom the management company has given or sent a statement in writing relating to that interest which complies with that Division within the period of six months immediately preceding the giving or sending of the advice.

Section 84 has since been amended by the Companies (Amendment) (No. 2) Act 1992 (Act A 836) with regard to the interpretation of the word 'interest'. Since Act A 836, interest is defined thus:

(it) means any right to participate or interest, whether enforceable or not and whether actual prospective or contingent -

(a) in any profits assets or realization of any financial or business undertaking or scheme whether in Malaysia or elsewhere;

(b) in any common enterprise whether in Malaysia or elsewhere in which the holder of the right or interest is led to expect profits rent or interest from the efforts of the promoter of the enterprise or a third party; ...

[(c) in any time-sharing scheme; or and]

[(d)] in any investment contract,

whether or not the right or interest is evidenced by a formal document and whether or not the right or interest relates to a physical asset, but does not include -

[(e)] any share in or debenture of a corporation;

[(f)] any interest in or arising out of a policy of life insurance; or

[(g)] any interest in a partnership agreement unless the agreement -

(i) relates to an undertaking, scheme, enterprise or investment contract promoted by or on behalf of a person whose ordinary business is or includes the promotion of similar undertakings, schemes, enterprises or investment contracts, whether or not that person is a party to the agreement; or

(ii) is an agreement, or is within a class of agreements, prescribed by regulations for the purposes of this paragraph;]

["time-sharing scheme" means a scheme, undertaking or enterprise -

(a) participants in which are, or may become, entitled to use, occupy or possess, for two or more periods during the period for which the scheme, undertaking or enterprise, whether in Malaysia or elsewhere is to operate, property to which the scheme, undertaking or enterprise relates; and

(b) that is to operate for a period of not less than three years.]

In the light of these far reaching amendments it is obvious that Parliament has had second thoughts about out-lawing time-sharing schemes. Whilst it is not my lot in the present proceedings to find if the word 'interest' as defined in s. 84 of the Act read together with s. 363(4) of the Act would now legalise time-sharing concepts, suffice it to say that the arguments of the 1st and 2nd defendants that the time-sharing concept is against public policy can no longer prevail.

The 3rd defendant's arguments can be summarised as follows:

(a) that the plaintiff's knowledge of the 3rd defendant's position as a nominee, raised an estoppel against the plaintiff from making the claim against the 3rd defendant.

(b) that the plaintiff knew that the 2nd defendant had agreed to indemnify the 3rd defendant should the plaintiff make a claim on the guarantee.

(c) the modifications and variations to the original sale and purchase scheme without the knowledge and consent of the 3rd defendant raised the defence of s. 86 of the Contracts Act 1956.

It is my finding that none of these arguments were pleaded, let alone proved in evidence. In any case, the conduct of the 3rd defendant in all matters and in his dealings with the plaintiff, ought to preclude his reliance on estoppel. He signed the guarantee not as a nominee but in his individual personal capacity. The guarantee is plain and simple and ought to be given its simplistic interpretation. If there is indeed any indemnity provided by the 2nd defendant, the 3rd defendant can no doubt claim such indemnity against the 2nd defendant.

In the circumstances, I had no hestitation in allowing the plaintiff's claim against all three defendants with interest at 8% per annum from 9 December 1991 to date of realisation and costs. I also dismissed the 1st and 2nd defendants' counter-claim with costs.

Reported by Anne Khoo